Supreme Court, U. S.
FILED
NOV 19 1976
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

## No. 76-551

AMERICANS UNITED, a Corporation, MISSOURI FRIENDS OF PUBLIC SCHOOLS, a Membership Association, G. HUGH WAMBLE and A. L. PALMER,
Petitioners,

v.

H. LANG ROGERS, F. WILLIAM McCALPIN, EUGENE STRAUSS, JOE T. BUERKLE, RICHARD BLANCK, VIRGINIA YOUNG, LELA HACKNEY BELL, EARL G. HARRIS and JOHN BIGGS, Constituent Members of the Coordinating Board for Higher Education of the State of Missouri,
Respondents,

and

INDEPENDENT COLLEGES & UNIVERSITIES OF MISSOURI, INC.,
Intervenor-Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

# RESPONDENTS' JOINT BRIEF IN OPPOSITION

JOHN C. DANFORTH
Attorney General
J. PAUL ALLRED, JR.
DANIEL P. CARD, II
Assistant Attorneys General
Supreme Court Building
Jefferson City, Missouri 65101
Attorneys for Respondents

BRYAN, CAVE, McPHEETERS & McROBERTS
R. H. McROBERTS, SR.
THOMAS C. WALSH
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Intervenor-Respondent

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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Respondents, members of the Coordinating Board for Higher Education of the State of Missouri, and Intervenor-Respondent, Independent Colleges and Universities of Missouri, Inc., jointly file this Brief in Opposition to the Petition for a Writ of Certiorari lodged in this Court on October 20, 1976.

## INTRODUCTION

The prolix Petition submitted to this Court, consisting of 67 printed pages, represents a flagrant violation of Rule 23 of the Rules of this Court, which requires that the Petition contain "a concise statement of the case," and "a direct and concise argument amplifying the reasons relied on for the allowance of the writ." Petitioners have made no attempt whatever to comply with that Rule but instead have essentially reprinted their entire state-court brief on the merits, which contains numerous matters completely extraneous to the single federal question presented here. Rule 23(4) provides that:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

Even in the days of less-crowded dockets, the Court has denied petitions of comparable length for violation of these guidelines. *Kennemar v. Billington*, 323 U.S. 709 (1944); *Zap v. United States*, 326 U.S. 777 (1945); *Tiger v. Lozier*, 275 U.S. 496 (1927); *Furness, Withy and Co., Ltd. v. Yang-Tsze Insurance Association, Ltd.*, 242 U.S. 430 (1917). Petitioners' callous disregard for the Rules and for this Court's caseload warrants denial of their Petition on that ground alone.

## STATEMENT OF THE CASE

This litigation involves a constitutional attack on Sections 173.200 to 173.235 of the Missouri Statutes, which created the Missouri Financial Assistance Program for needy students of higher education in that State. The Program, adopted in 1972, is similar to the Federal Basic Educational Opportunity Grant Program created by 20 U.S.C. § 1070(a). Financial awards under the Missouri Program, including about 12% federal matching funds, are paid directly to the students, who may use them for the payment of tuition, room and board or fees at any approved *public* or *private* college in Missouri. The purpose of the Act, as stated in § 173.200, is to encourage "deserving and qualified youths to realize their aspirations for higher education" and "to enable qualified full-time students to receive *non-religious* educational services in a public or private institution of higher education of their choice."[1]



The statute stipulates that a recipient student must attend an "approved" public or private institution. Under the unique provisions of Section 173.205, as construed by the Missouri Supreme Court, a private institution can be "approved" only if it (1) is a non-profit organization controlled by a board which is independent of church or sectarian control; (2) permits faculty members to select textbooks without influence or pressure from any source; and (3) does not discriminate in the hiring of administrators, faculty or staff or in the admission of students on the basis, *inter alia*, of religion.[2] Section 173.215.1(6) provides that no award can be made to any applicant "who is enrolled, or who intends to use the award to enroll, in a course of study leading to a degree in theology or divinity."

The Program is administered by the Coordinating Board, which originally certified 31 private and 26 public institutions as "approved" within the meaning of the Statute.[3] During the 1974-75 academic year, more than 10,000 students received

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[1] Emphasis ours here and throughout this brief except where otherwise indicated.

[2] Similar requirements are imposed upon public colleges in order to attain "approved" status.

[3] Since the filing of the Missouri Supreme Court opinion, two private colleges (Evangel and St. Paul's) have been de-certified, and a third (Hannibal-LaGrange) has been suspended and ordered to show cause why its approval should not be withdrawn.

awards totaling approximately $3.8 million (including federal monies). Of these, 56.1% used their awards at public colleges and 43.9% at private colleges.

Petitioners initiated this action in state court primarily under the church-state provisions of the Missouri Constitution, which repeatedly have been characterized as far more restrictive than the First Amendment. *Luetkemeyer v. Kaufmann*, 364 F.Supp. 376 (W.D. Mo. 1973) *aff'd*, 419 U.S. 888 (1974); *Brusca v. State of Missouri ex rel. State Board of Education*, 332 F.Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) *cert. denied*, 419 U.S. 1111 (1975). The Missouri Supreme Court not only found the Act to be constitutional under the First Amendment, but also held that it did not run afoul of the considerably more stringent provisions of the state constitution.[4]

In its First Amendment analysis, the Court below relied heavily on this Court's recent opinion in *Roemer v. Board of Public Works of Maryland*, — U.S. —, 49 L.Ed.2d 179 (June 21, 1976), and applied the three-part test of that case as evolved from others such as *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Hunt v. McNair*, 413 U.S. 734 (1973). The Court held that the Missouri Act (1) has a secular purpose, (2) has a primary effect other than the advancement of religion, and (3) does not foster excessive entanglement. The secular purpose of the Act is readily discernible, *inter alia*, from the declaration of purpose inserted by the General Assembly in Section 173.200, and the Court noted that "an educated citizenry contributes to the welfare of the state as well as its economic and social potential." 538 S.W.2d at 717. The Court analyzed the following factors in determining that the advancement of religion was not the "pri-

[4] Although three judges dissented from this ultimate holding, none of the dissenters would have held the Act to be violative of the First Amendment.



mary effect" of the Act: (a) the funds are the property of the students and are payable to the students, who may use them to defray educational costs at the institution of their choice; (b) the majority of the students participating in the Program attend public, rather than private institutions, and only seventeen of thirty-one private institutions have any church relationship at all; (c) colleges and universities are "completely different types of educational entities" than parochial elementary and secondary schools involved in the cases relied on by petitioners; (d) there is no direct payment by the state to any college, and to the extent that the college does receive the money, it is not in the form of an unrestricted gift, but rather the college is required to supply a *quid pro quo* to the student in the form of an educational opportunity; and (e) the statutory requirements are adequate to prevent participation by a pervasively sectarian institution. 538 S.W.2d at 720-21.

Finally, the Missouri Supreme Court rejected the contention that the Act fosters excessive entanglement, noting that the involvement of the colleges with the state consists of nothing more than verification by the college of a student's enrollment. *Id.* at 718. Unquestionably, the Missouri Program creates considerably less entanglement than the Maryland plan approved in *Roemer*.

The Court observed that petitioners had sought only a declaration of "facial" invalidity and that they had resisted a college-by-college examination to determine whether the Act was being *applied* in an unconstitutional manner. The Court concluded, *l.c.* 718, that "the statutory program in question 'facially' is not violative of the First Amendment to the United States Constitution," and suggested that since the trial court had not undertaken to determine which, if any, of the challenged colleges should be declared ineligible for participation in the Program, "we do not think it appropriate for an appellate court to do so in the first instance." *Id.* at 722. Inasmuch as the Act was

facially valid, the Court suggested that the remaining questions of statutory interpretation and implementation should be first considered by the Coordinating Board.

Prior to filing their Petition in this Court, petitioners requested Mr. Justice Blackmun to stay application of the Statute pending Certiorari proceedings, but their Motion was denied on August 25, 1976 (No. A-160, O.T. 1976).



## REASONS WHY THE WRIT SHOULD BE DENIED

Initially, it is apparent that none of the petitioners have legal standing to challenge the Missouri statute in this Court. Petitioner Americans United is a not-for-profit foreign corporation not even licensed to transact business in Missouri (Tr. 11).[5] Despite respondents' challenge to petitioners' standing (Tr. 14, 20), none of the petitioners offered even one shred of evidence that they have ever paid as much as one dollar in state or federal taxes. Therefore, what they are seeking to litigate here is "not a direct dollar-and-cents injury but is a religious difference" which does not create a "case or controversy" in the Article III sense. *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952). See also *Flast v. Cohen*, 392 U.S. 83 (1968); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). Hence, irrespective of petitioners' standing in the state system, there is a fundamental jurisdictional defect in this Court. *Doremus, supra*, at 434.

Turning to the merits, it bears repeating that this case involves only a "facial" attack upon the Missouri Program. Nevertheless, petitioners have devoted 30 pages of their Petition to a distorted review of the operations of 17 approved Missouri colleges which they contend are "sectarian" in nature. We deem it inappropriate to engage in a detailed refutation of petitioners' slanted analysis of these colleges, especially in view of the single narrow issue presented. But we would hasten to point out that *no* court has held that any of these institutions is "sectarian" in nature or "permeated by a religious atmosphere," and in any event the record will not support any such finding. Petitioners

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[5] In *Roemer v. Board of Public Works of Maryland*, 387 F.Supp. 1282 (D. Md. 1974), *aff'd on other grounds*, — U.S. —, 49 L.Ed.2d 179 (June 21, 1976), Americans United was held to be without standing to raise similar issues in its home state of Maryland.

apparently intend to ask this Court to make that finding in the first instance.[6]

The Petition also seeks to create the impression that the vast majority of the colleges attended by recipients under the Program are pervasively sectarian private schools. Petitioners neglect to mention that more than half of the recipient students attend *public* colleges and that only 17 of the 57 approved colleges in the State have even been charged with being sectarian. Indeed, the Missouri Supreme Court indicated that only four colleges appeared to present any serious questions, and in the wake of that Court's ruling and pursuant to its mandate, two of those four colleges have been expelled from the Program by the Coordinating Board on *statutory* grounds, and a third has been suspended. Yet petitioners are seeking a declaration of *facial* invalidity and are asking the Court to enjoin the entire Program, even as it affects thousands of students attending the 40 colleges which admittedly have no connection whatever with any church.

Moreover, the Stipulation entered into by the parties flatly refutes petitioners' characterization of the 17 challenged institutions. In particular, petitioners have emphasized the number of religion or theology courses taught by certain colleges but have failed to report that the Stipulation provides as follows:

> "Religion or theology courses both at public and private institutions are taught from an academic approach which overall encourages discussion rather than dogmatic indoctrination. In some of the religion or theology courses offered by some of the institutions listed in paragraph 3 hereof, there may be a greater exposure to the history or

[6] There is an additional problem with petitioners' emphasis on the activities of the various institutions, which derives from the fact that the Missouri Program provides student aid, rather than institutional aid. The college which eventually receives the state money is chosen by the student, not by the legislature, and the activities of that institution are constitutionally irrelevant.



> views of the sect or denomination with which those institutions have been historically associated than to those of any other particular sect or denomination. All views are exposed in a neutral manner, however, and the instructors solicit all opinions, whether religious, agnostic or atheistic. In no case does a student's grade depend upon his acceptance or rejection of any particular view. The student is free to accept, reject, question or criticize any subject or viewpoint discussed during the course. In most cases, the religion or theology teacher is unaware of the religious affiliation or preference of individual students" (Tr. 123).

All of the participating colleges, public and private, are approved by an independent accrediting organization (Tr. 113-14), feature an atmosphere of academic freedom (Tr. 119), and ascribe to the principles of academic freedom set forth in the 1940 Statement of the American Association of University Professors (Tr. 112-15, 119). None of the Missouri colleges has ever refused admission to any student on the basis of religion (Tr. 122), and the Stipulation further provides that, with the possible exception of the institutions which have since been expelled or suspended, none of the governing boards of any college, or the members thereof, "are legally responsible or accountable to any church, sect, denomination or religious body for the operation or conduct of the institution" (Tr. 115). Only one of the currently approved colleges requires any chapel attendance, and even there the student may meet the requirements by attending convocation programs of a non-religious nature (Tr. 126). The Court will note the similarity of the institutions in this case to those involved in *Roemer*. In fact, the Missouri colleges are significantly less church-related than the Maryland colleges in *Roemer*.

The Petition filed in this case is a veritable hodge-podge of irrelevancies and includes criticism of one school's prohibition against dancing (Pet. 19); disapproval of the availability of

non-compulsory church services (Pet. 15, 25, 26, 29, 34); and the general suggestion that anyone who believes in God is "tainted" (Pet. 38). Petitioners have completely misconceived the nature of private higher education and the scope of the Establishment Clause, as manifested by their specious assertion that participating private institutions are constitutionally prohibited from engaging in any activities which would not be tolerated in public colleges (Pet. 40).

Petitioners' approach to the Establishment Clause issue is dominated by the seriously mistaken notion that any organization which encourages people to lead an ethical and moral life consistent with Judeo-Christian principles is thereby "sectarian" to the extent that it is constitutionally disentitled to receive state or federal money, directly or indirectly. Aside from the "free exercise" and equal protection problems which inhere in such a theory, petitioners' plea for compulsory atheism is at odds with numerous decisions of this Court, including *Zorach v. Clauson*, 343 U.S. 306 (1952); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Walz v. State Tax Commission*, 397 U.S. 664 (1970); and *McCollum v. Board of Education*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring). The fact is that none of the challenged Missouri colleges has been held to be "sectarian" by either of the lower courts, and petitioners' self-serving characterization of them as "sectarian" is pegged on a grievously distorted analysis of the record and misapprehension of the law.

This Court has stressed that total separation of church and state is simply not possible in our society nor is it demanded by the Establishment Clause. *Zorach v. Clauson, supra; Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. State Tax Commission, supra.* Rather, as recently reaffirmed in *Roemer, supra*, at 188: "Neutrality is what is required. The State must confine itself to secular objectives and neither advance nor impede religious activity." It cannot seriously be contended that



a student assistance program which enables needy students to attend the public or private college of their choice does not fulfill a worthwhile secular objective. *Everson v. Board of Education*, 330 U.S. 1 ( 1947); *Board of Education v. Allen, supra.*

Another of the principal shortcomings of petitioners' First Amendment analysis arises from their refusal to acknowledge the well-accepted distinction between higher education and the elementary and secondary parochial schools involved in such cases as *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); and *Meek v. Pittenger*, 421 U.S. 349 (1975). In *Tilton v. Richardson, supra* at 685-86, the plurality opinion expressly took note of the distinctions between college education and that provided at lower levels:

> "There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age' . . . There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virture of their own internal disciplines. Finally, many church-related colleges and universities seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom."

Petitioners continue to assert that the earlier college-aid cases were decided on the basis of "the nature of the aid received

and not upon the nature of the recipient" (Pet. 45). Such a statement completely disregards the holding in *Roemer, supra,* at 199, where it was observed that:

> "Our holdings are better reconciled in terms of the character of the aided institutions, found to be so dissimilar as between those considered in *Tilton* and *Hunt* on the one hand, and those considered in *Lemon I, Nyquist,* and *Levitt,* on the other."

Even when the nature of the aid is scrutinized, petitioners fare no better. They attempt to blur the clear distinction between the Missouri Student-Aid Program and the outright institutional grants of state monies that were involved in this Court's decisions in *Roemer, Tilton* and *Hunt.* The cornerstone of petitioners' argument is that no program of aid to education can receive First Amendment approbation unless the statute contains an express restriction against the ultimate use of the funds by the college for "sectarian purposes." Petitioners' insistence upon a restriction against "sectarian use" ignores the nature of tuition itself and the Missouri Supreme Court's holding that the true beneficiaries of the Program are the students, not the colleges. Rather than authorizing outright institutional grants or the construction of a building, the instant case involves awards to individual students who use the funds, together with federal grants, scholarships and their own finances, to purchase an educational opportunity. By definition, the institution is not free to expend the funds for any purpose it pleases, but it is required to provide a *quid pro quo* to the student.[7] The evidence also reveals that the tuition fees charged by Missouri colleges cover less than one-half of the cost of a student's education (Tr. 127).

Contrary to petitioners' suggestion, this Court has never intimated, much less held, that a restriction against "sectarian

[7] Moreover, the record shows that there are a great many instances in which the student has already paid his account to the school by the time the award checks are issued, and his check is therefore delivered to and retained by him (Tr. 111-12, 146).



use" is a *sine qua non* of the constitutionality of a tuition assistance program. It is true that in *Roemer,* the Court recognized that a "secular use" restriction may be appropriate in cases of *direct* and *uncategorical* gifts of state money to a sectarian institution. The plurality opinion, however, indicated that this restriction was necessary only because of the direct nature of the aid, *l.c.* 188:

> "The Court has taken the view that a secular purpose and a facial neutrality *may* not be enough if in fact the State is lending *direct* support to a religious activity."

Obviously, the form of the "aid" dictates what type of restrictions, if any, may be required. The sectarian restriction to the uncategorical institutional grants in *Roemer* and to the building usage in *Tilton* was necessary to prevent the funding of any "specific religious activity." *Roemer, supra,* at 191, 195. There is no danger of such funding when the money is given to the student, who uses it for tuition, room and board, books, transportation or to help pay other educational expenses at the public or private college of his choice. The funds have lost their identity as "state" money by the time they are paid over to the college, if indeed the college ever receives them. To require each institution to trace each dollar from the state treasury through the student to the college and then to the ultimate use employed by the college is not only unnecessary but impracticable.

In the Tennessee decision referred to by petitioners, *Americans United v. Dunn,* 384 F.Supp. 714 (M.D. Tenn. 1974), the lower court refused to apply the appropriate tripartite test, and this Court, after staying the enforcement of the district court's decree, 420 U.S. 917, and noting probable jurisdiction, 420 U.S. 989, vacated that court's judgment as moot following an amendment to the Tennessee statute, 421 U.S. 958.

The only other federal decision involving a tuition assistance program was the Kansas case of *Americans United v. Bubb,*

379 F.Supp. 872 (D. Kans. 1974). The Kansas statute had no restriction against the ultimate use of funds by the colleges, and in fact contained fewer safeguards than the Missouri Program. Nevertheless, the Kansas Act was upheld as facially constitutional by a three-judge court, and Americans United did not seek review in this Court.

The Missouri Supreme Court properly refused to accept petitioners' "facial" argument based exclusively upon an unproven and hypothetical misuse of funds. The entire thrust of petitioners' case, as revealed by their Petition, is that any *possible* abuse, present or future, should serve to vitiate the entire statute. Such a contention is based upon a faulty reading of *Roemer*, in which it was said, *l.c.* 196:

> "It has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds."

Three times in the last five years, this Court has scrutinized programs for aid to higher education and each such program has been found to pass constitutional muster. As a result,

> ". . . the slate we write on is anything but clean. Instead there is little room for further refinement of the principles governing public aid to church-affiliated private schools. Our purpose is not to unsettle those principles, so recently reaffirmed . . . or to expand upon them substantially, *but merely to insure that they are faithfully applied in this case*." *Roemer, supra*, at 192.

The governing principles are well established, and this case is *a fortiori*.



## CONCLUSION

The distinctive Missouri Statute separates the church from the state to a far greater degree than any college program considered by this Court in previous cases. If petitioners' theory of constitutional law were to prevail, it would require invalidation of every federal student assistance program, including the venerable GI Bill of Rights, 38 U.S.C. § 1651. The Missouri Supreme Court "faithfully applied" the well-settled teachings of *Roemer* and its progenitors and reached the only result attainable on the facts of this case.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General

J. PAUL ALLRED, JR.
DANIEL P. CARD, II
Assistant Attorneys General

Supreme Court Building
Jefferson City, Missouri 65101

Attorneys for Respondents

BRYAN, CAVE, McPHEETERS & McROBERTS

R. H. McROBERTS, SR.
THOMAS C. WALSH
500 North Broadway
St. Louis, Missouri 63102

Attorneys for Intervenor-Respondent